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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA,
Petitioner,

v.

SYLVESTER WEAVER, ET ALS., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order and judgment entered on September 6, 1972, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered September 6, 1972, is set forth in the Appendix, p. 1a. The opinion of that Court is not yet reported. The decision of the United States District Court for the

Middle District of Florida entered on November 10, 1971, is set forth in the Appendix, p. 4a. This decision is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on September 6, 1972. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is there a dual school system remaining to be dismantled in a system of sixty-seven (67) schools where sixty-six (66) of the schools have been fully desegregated and where the school system has been under the continuous supervision of the Federal Courts since 1961, during which period of time the school system has grown approximately sixty-six (66) per cent?

2. Did the United States Court of Appeals for the Fifth Circuit correctly interpret and apply *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in disapproving a majority to minority plan for one school in a system of sixty-seven (67) schools, all of which were otherwise fully desegregated?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. Proceedings in the District Court

This school desegregation suit was originally filed on October 13, 1961, in the Southern District of Florida

by a number of black children and their parents as a class action, who alleged a denial of equal protection of the laws arising out of the district's assignment of students pursuant to the Florida Pupil Assignment Law and the operation of a compulsory biracial school system in Brevard County, Florida.

Plaintiffs sought an injunction enjoining the School Board from operating a biracial school system and also requiring the Defendant School Board to present a complete desegregation plan for the reorganization of the entire school system of Brevard County into a unitary, non-racial school system which plan shall include a plan for the assignment of children on a non-racial basis; the assignment of teachers, principals and other professional school personnel on a non-racial basis; the allotment of funds on a non-racial basis; the approval of budgets on a non-racial basis; and the elimination of any other discrimination or distinction in the operation of the school system or in the school curricula which are based solely upon race and color. It should be noted here that at the time of the filing of the above suit the Brevard County school system had a total student population of twenty-three thousand seven hundred and forty-two (23,742) students.

The school district thereafter filed a plan which was approved by the District Court with certain additions and modifications and as amended was duly implemented. The Court approved plan provided among other things that all students would be assigned to school on the basis of neighborhood geographic attendance zones, that is, to the school nearest their residence. All students would attend the school designated for the zone in which they resided with certain minor exceptions allowing for the utilization of existing school

space to the best advantage but with no assignment or transfer being based on racial considerations. There were also provisions for mentally and physically handicapped children, but all based without regard to race. The Court approved plan also provided that new construction and expansion of existing facilities be done without racial discrimination.

On April 28, 1967, and pursuant to Plaintiffs' request by motion for further relief, the District Court by corrected decree ordered a transition of the Brevard County school system to a freedom of choice desegregation plan.

On May 13, 1969, and pursuant to Plaintiffs' request again by motion for further relief, asking that the school district be required to submit a desegregation plan other than freedom of choice, the District Court ordered approval of a plan for Poinsett and Stone, the only remaining predominantly all black schools, which utilized a number of well recognized desegregation tools, including redrawn attendance zones and boundaries, restructuring of grades, distribution of students by busing, pairing and clustering of adjacent schools and grades.

It should be noted here that the District Court in its order found that the Poinsett Elementary School serves an area of primarily Negro residences so that almost all of its students are within walking distance. The District Court also noted the Plaintiffs' objection on the ground that busing of students into Poinsett could produce more intergration, but answered by stating, "The goal of the desegregation law, however, is not any particular ratio but a school where all vestiges of state imposed segregation have been eliminated".

The Court's attention is invited to the fact that the School Board and the District Court expressly considered pairing and busing for Poinsett School but both rejected the same in favor of the zoning plan which would permit all the Poinsett students to walk to school.

The District Court found that under all the circumstances the plan approved met the requirements of law and that the Brevard School Board had, in good faith, already brought substantial desegregation in Brevard County and determined that the above plan when implemented, which it was, would complete desegregation in the county's public schools.

This order of May 13, 1969, was never appealed and petitioner contends that any vestiges of a dual school system in Brevard County, Florida, ended then and there.

On November 10, 1971, and pursuant to the Plaintiffs' third or fourth request for further relief, the District Court ordered approval of a majority to minority plan for Poinsett School with guaranteed space available and transportation provided for students electing to transfer where the school is more than two (2) miles from the student's home and provided further the transportation for a student electing a school less than two (2) miles from his home shall be provided, if conditions exist which would make it dangerous for such students to walk to school.

2. The Decision of the Court of Appeals (1972)

The Plaintiffs appealed contending that a greater degree of desegregation could be achieved by employing a different method of desegregation, basically on an argument that my plan is better than your plan.

On September 6, 1972, the Court of Appeals reversed and remanded to the District Court for further proceedings consistent with the remedy directed in *Cisneros* v. *Corpus Christi Independent School District*, — F.2d — (Fifth Cir. Aug. 2, 1972) (*en banc*).

The Court of Appeals appears to have based its disapproval of the majority to minority transfer plan on the observation that the racial composition of the Poinsett School remains predominantly black and on the assumption that there cannot be a unitary school system that has even one predominantly black school remaining and on the further assumption that it must approve the plan that mixed the races the most.

REASONS FOR GRANTING THE WRIT

In *Drummond* v. *Acree*, — U.S. —, 34 L. Ed. 2d 33, 93 S. Ct. —, Sept. 1, 1972, Mr. Justice Powell acting as Circuit Justice referred to the *Swann, supra*, case when he said, "The Court went on to caution lower Federal Courts that, in the exercise of their broad remedial powers, their focus must be on dismantling dual school systems rather than on achieving perfect racial balance".

In *Winston-Salem/Forsyth County Board of Education* v. *Scott, et al.*, 404 U.S. 1221, 31 L.Ed. 2d 441, 92 S.Ct. —, Aug. 31, 1971, The Honorable Chief Justice Burger acting as Circuit Justice referred to a portion of the *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 28 L.Ed. 2d 577, 91 S.Ct. 1289 (1971), wherein in its remand, the Court of Appeals stated in part: "It is now clear, we think, that in school systems that have previously been operated separately as to the races by reason of state action,

'the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation' Davis, supra, at 37, 28 L.Ed. 2d at 580".

In *Swann, supra*, the Court said, "While the existence of a small number of one-race, or virtually one-race school does not in itself denote a system that still practices segregation by law, the Court should scrutinize such schools and require the school authorities to satisfy the Court that the racial composition does not result from present or past discriminatory action on their part".

Poinsett School was first opened in the fall of 1960. The current school desegregation case was filed in the District Court in the fall of 1961. The Brevard County school system had twenty-three thousand seven hundred and forty-two (23,742) students at that time. The Brevard County school system has been continuously under the supervision of the District Court since then and has utilized practically all the tools of desegregation as ordered by the District Court, at one time or another during its eleven (11) year supervision period, all as is shown in this petition in the statement of the case. During this period of time exemplary desegregation has taken place as found by the District Court which has included a change in the system from a time when Brevard County had nine (9) all black schools, seven (7) desegregated schools and thirty-two (32) white schools until in 1970-71, the school system has approximately sixty thousand (60,000) students, approximately ten (10) per cent of which are black, sixty-six (66) fully desegregated schools and one school which

is presently predominantly black. It appears from the statistics that the Brevard County school system has during the period of time from the first filing of this current desegregation suit in 1961 through and including 1971, during which time it was under the direct and continuing supervision of the District Court expanded and grown in both pupils and buildings approximately sixty-six (66) per cent. One can safely say as far as desegregation and the assignment of students go the Brevard County school system has grown up in Federal Court.

It is respectfully submitted that this Court needs to determine if there is a dual school system here or vestiges of a dual school system requiring dismantling. Has there been unconstitutional discrimination by the School Board and if so when, where and how in order for correct Federal questions of constitutional law to be properly applied by lower Federal courts.

The Court's attention is also invited to the apparent different posture in which the United States Court of Appeals for the Sixth Circuit handled a similar factual situation in its circuit than did the Fifth Circuit in this case, in *Mapp* v. *Board of Education* presently unreported but found in 41 L.W. 2208, decided October 11, 1972, wherein the Circuit Court of Appeals took the position that the Chattanooga Tennessee School Board's good faith compliance with the District Court's desegregation order since 1960 shifted the burden of proving that remaining racial imbalances are result of board's or state's discriminatory action, from the school board to the plaintiffs.

Petitioner and those similarly situated in this country need the questions and points of law involved in this

case answered in order to intelligently plan and provide for quality education for all students.

Undoubtedly *Brown* v. *Board of Education*, 347 U.S. 483 (1954), while striking down separate but equal education nevertheless intended to begin the requirement of quality education for all students regardless of race.

The decision of the Court of Appeals in this case involves a Federal question of great importance, namely the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as it is applied to desegregation in the public school systems and to the right of an individual student to receive the very best education possible. Petitioner contends that the Court of Appeals in this case has decided a Federal question, as set forth above, in conflict with the applicable decisions of this Court in *Swann, supra,* and related cases.

Petitioner respectfully suggests that question one in this petition for certiorari raises important Federal questions which have not been completely and entirely answered by this Court but should be for the edification of those similarly situated. Petitioner further suggests that this case can be used by the Court for clarifying situations in which a predominantly all white or all black school can be allowed to exist as discussed by the Court in the *Swann, supra,* case.

This Court can use this case to further elaborate and clarify the law as it relates to the vestiges of the dual school system, such as what constitutes the maintaining of a dual school system. Has a dual school system been maintained when it has followed in good faith Federal Court orders for a substantial period of time? (In this case in excess of ten (10) years). When do the vestiges

of a dual school system terminate when it has operated similarly to the factual situation in this case?

This case provides an opportunity for this Court to give some clear definitive examples of application to the law showing the Court's distinctions between racial balancing as opposed to desegregation and when and under what circumstances has a Court gone beyond desegregation and into the area of racial balancing. This case could be used by this Court to demonstrate an acceptable degree of desegregation. It could also be used to demonstrate whether or not the law of the land requires that all the tools of desegregation must be applied to each and every school in the system as opposed to the system itself in order to be unitary and fully desegregated. This case also provides the Court with an opportunity to create case law indicating when and under what conditions further District Court involvement is unnecessary.

The Circuit Court of Appeals for the Fifth Circuit has incorrectly interpreted and applied the principles of this Court as announced in the *Swann, supra,* case and related cases in the following respects:

1. Finding the school system to be unitary except for one school. It is contended that the *Swann, supra,* case allows for a unitary school system to have, "a small number of one race schools," and one such school meets this requirement.

2. In requiring a unitary school as distinguished from a unitary school system.

3. In disapproving the majority to minority plan because of remaining racial composition and one remaining predominantly all black school. *Swann, supra,*

indicates that the Court must look first to dismantling dual school systems rather than on achieving perfect racial balance and if this had been done then there would have been no dual school system existing to further dismantle.

4. In assuming that in this case it had to approve the plan that mixed the races the most, as the *Swann, supra,* case does not envision a perfect racial balance in all schools and on the further basis that the *Davis, supra,* case required this standard of desegregation (maximum mixing) in school systems that have previously been operated separately as to the races by reason of *state action* (emphasis supplied), which is not the *Poinsett* case since it has been operated by reason of Court action for every year it has been in use except for the first year.

5. In indicating that all the tools of desegregation must be applied to a particular school which would have the result of racial balancing rather than desegregation and would eliminate any predominantly remaining one race schools and would also eliminate the use of a majority to minority plan as no need would ever exist for such a plan which is all contrary to the principles of the *Swann, supra,* case.

6. In tiptoeing through a semantical wonderland to require a constitutional prohibited racial balance under the guise of desegregation.

The confusion and uncertainty in this field of constitutional law is costly in terms of tax money raised and appropriated to educate students and in terms of impairment of educational programs in school systems kept in constant disruption and change by a succession

of Court orders. The public interest would be served by settlement of these constitutional questions at the earliest possible time and this case is an appropriate vehicle for that purpose.

The courts below have misread and misapplied a constitutional interpretation of this Court in a matter of great public importance and the lower federal courts are in conflict as to the correct interpretation of this Court's decision in *Swann, supra.* For these reasons it is urged that the writ should be granted.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the order, judgment and opinion entered September 6, 1972, by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3465

SYLVESTER WEAVER, ET AL., *Plaintiffs-Appellants,*

versus

BOARD OF PUBLIC INSTRUCTION OF BREVARD COUNTY, FLORIDA, *Defendant-Appellee*

Appeal from the United States District Court for the Middle District of Florida

(September 6, 1972)

Before BELL, AINSWORTH and GODBOLD, *Circuit Judges.*

GODBOLD, Circuit Judge: The appellee School Board operates 67 schools in a system 90% white—10% black. Following a hearing conducted in August 1971 the District Court found the system to be unitary except for one school, Poinsett Elementary, located in the urban area of Cocoa, Florida. According to June, 1971 figures Poinsett was 96.97% black. The District Court required the Board to submit by September 15, 1971 a plan for the desegregation of Poinsett. The Board responded with a proposal of discontinue the use of school as a regular elementary facility and to convert it to a special education center no latter than January 26, 1972, housing a county-wide kindergarten program and a model demonstration school, to be attended on a rotating basis by students from throughout the county. Substantial bus transportation would be required, some of it over considerable distances. Pupils previously as-

signed to Poinsett would be assigned to these six predominantly white elementary schools.

School	Approx. distance from Poinsett
Golfview	1.2 miles
Cambridge	2.2 "
Mila	3.0 "
Anderson	3.5 "
Tropical	4.2 "
Audubon	5.6 "

A hearing was conducted on the Board plan on October 14, but on October 22 the Board asked for a delay and an opportunity to present an alternate plan. The alternate, presented October 29, consisted solely of majority-to-minority transfer from Poinsett to any of the above six predominantly white schools, with guaranteed space available and bus transportation for students living more than two miles from Poinsett. The court approved this alternate, with minor modifications, on November 11. Plaintiffs appealed.

At the direction of this court the Board has filed supplemental data, as of March 1972, revealing that 100 black pupils from Poinsett availed themselves of majority-to-minority transfers. Nevertheless the racial composition of Poinsett as of March, 1972 remained 97% black—648 black pupils and 22 white. The Board also reported that it proposed to continue the same use of the Poinsett school in 1972-73, and estimated that the racial composition would be 670 black, 20 white, or still 97% black.

It is obvious that this arrangement for Poinsett does not meet standards for school desegregation. This one school, substantially all-black and continuing to be such, is in close proximity to predominantly white elementary schools, the same schools to which the Board, in its original plan of closing Poinsett, proposed that *all* Poinsett students

be transferred, with transportation furnished beyond two miles.

Majority-to-minority transfer is a valuable tool for school desegregation, ordinarily employed in conjunction with other means. In this instance, with other means available whose legal validity is not subject to serious question, the employment of majority-to-minority transfer as the sole means of desegregating Poinsett, will not stand scrutiny.

In *United States* v. *Texas Education Agency*, — F.2d — (5th Cir., August 2, 1972) (en banc), seven of fourteen participating members of this court joined in the view (slip op. p. 89) that pending further Supreme Court action "we should hold in abeyance all those pupil assignment cases which cannot be solved by well recognized tools whose validity is beyond question, such as pairing contiguous schools, majority to minority transfers, and minimal additional transportation of students." This is not such a case. The contiguous elementary schools are predominantly white and are not far distant, presenting the traditional context in which pairing is employed.

The case must be reversed and remanded to the District Court for further proceedings consistent with the remedy directed in *Cisneros* v. *Corpus Christi Independent School District*, — F.2d — (5th Cir. August 2, 1972) (en banc).

Reversed and Remanded.

APPENDIX II

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 1172 ORL CIV

SYLVESTER WEAVER, et al, *Plaintiffs*,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF BREVARD COUNTY, FLORIDA, *Defendant*.

Order

This cause is before the Court on plaintiffs' motion for further relief filed June 24, 1971. After a hearing on August 23, 1971, the defendant was directed to file a plan for further desegregation of Poinsett Elementary School. A plan was filed to which plaintiffs objected and a hearing on the plan was held October 14, 1971. The defendant subsequently filed an alternative plan on October 29, 1971, approved by the School Board of Brevard County, Florida, on October 28, 1971, which plan provides for a majority to minority transfer policy with guaranteed space available and transportation provided for students electing to transfer where the school is more than two (2) miles from the student's home.

Brevard County has sixty seven elementary, junior and senior high schools and the racial membership of the student bodies, as indicated by Appendix "A", attached hereto, have, except for one school, attained an exemplary degree of desegregation. The one and only school in the entire system which has a predominately black student body is Poinsett Elementary School and it is as to only that school that the present controversy exists. The most recent proposal of the Board of Public Instruction is one which was recognized with approval in the case of *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) and after hearing all of the evidence in this case it appears to this Court to be feasible and workable; it is therefore,

ORDERED and ADJUDGED that the alternative plan filed October 29, 1971 be and is hereby approved, provided, however, that transportation for a student electing a school less than two (2) miles from his home shall be provided, if conditions exist which would make it dangerous for such students to walk to school; and it is further,

ORDERED and ADJUDGED that the majority to minority transfer plan as to Poinsett Elementary School be made effective and implemented without delay so that all parents and pupils potentially affected by such plan can be notified and have an opportunity to exercise an option thereunder so as to effectuate transfers by the beginning of the next six (6) weeks grading period; and it is further,

ORDERED and ADJUDGED that the school board shall file semi annual reports during the school year similar to those required in *United States* v. *Hinds County School Board*, 433 F. 2d 611, 618 19 (5th Cir. 1970).

DONE and ORDERED in Chambers at Orlando, Florida, this 10th day of November, 1971.

GEORGE C. YOUNG
United States District Judge

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Exhibit A (1)

MEMBERSHIP AT CLOSE OF 1970-71 SCHOOL YEAR, JUNE 9, 1971

North Area

	Negro	Other	Total	Percent
Apollo Elementary	80	757	837	9.55
Coquina Elementary	64	931	995	6.43
Imperial Estates Elem.	68	524	592	11.48
Jackson Jr. High	135	1,091	1,226	11.01
Madison Jr. High	117	842	959	12.20
Mims Elementary	89	368	457	19.47
Oak Park Elementary	89	828	917	9.70
Old Dixie Elementary	119	489	608	19.57
Parkway Jr. High	79	782	861	9.17
Pinewood Elementary	27	261	288	9.37
Riverview Elementary	134	502	636	21.06
Southlake Elementary	110	702	812	13.54
Titusville High	163	2,168	2,331	6.99
Whispering Hills Elem.	89	555	644	13.81
Totals	1,363	10,800	12,163	11.20

* Includes grades kindergarten through 12 plus exceptional education.

Exhibit A (2)

MEMBERSHIP AT CLOSE OF 1970-71 SCHOOL YEAR, JUNE 9, 1971

Central Area

	Negro	Other	Total	Percent
Andersen Elementary	51	762	813	6.27
Audubon Elementary	2	928	930	.21
Cambridge Elementary	63	708	771	8.17
Capeview Elementary	5	807	812	.61
Carroll Elementary	74	692	766	9.66
Clearlake Jr. High	193	855	1,048	18.41
Cocoa Beach High	2	888	890	.22
Cocoa High	229	1,474	1,703	13.44
Edgewood Jr. High	85	1,132	1,217	6.98
Fairglen Elementary	85	752	837	10.15
Freedom 7 Elementary	0	816	816	.00
Gardendale Elementary	161	578	739	21.78
Golfview Elementary	79	553	632	12.50
Jefferson Jr. High	33	1,001	1,034	3.19
Kennedy Jr. High	254	517	771	32.94
Merritt Island High	51	1,650	1,701	2.99
Mila Elementary	12	705	717	1.67
Pineda Elementary	216	815	1,031	20.95
Pinegrove (Spec. Ed.)	35	68	103	33.98
Poinsett Elementary	737	23	760	96.97
Rockledge Elementary	93	392	485	19.17
Rockledge High	353	978	1,331	26.52
Roosevelt Jr. High	2	906	908	.22
Saturn Elementary	173	571	744	23.25
Stevenson Elementary	92	526	618	14.88
Tropical Elementary	0	974	974	.00
Totals	3,080	20,071	23,151	13.30

* Includes grades kindergarten through 12 plus exceptional education.

Exhibit A (3)

MEMBERSHIP AT CLOSE OF 1970-71 SCHOOL YEAR, JUNE 9, 1971

SOUTH AREA

	Negro	Other	Total	Percent
Allen Elementary	0	662	662	.00
Central Jr. High	88	1,268	1,356	6.48
Creel Elementary	114	391	505	22.57
Croton Elementary	9	827	836	1.07
DeLaura Jr. High	27	1,476	1,503	1.79
Eau Gallie High	38	1,593	1,631	2.32
Gemini Elementary	52	568	620	8.38
Harbor City Elementary	62	739	801	7.74
Henegar Elementary	89	349	438	20.31
Holland Elementary	27	897	924	2.92
Hoover Jr. High	5	1,111	1,116	.44
Indialantic Elementary	74	739	813	9.10
Johnson Jr. High	45	1,136	1,181	3.81
Meadowlane Elementary	168	652	820	20.48
Melbourne High	259	1,745	2,004	12.92
Ocean Breeze Elementary	4	882	886	.45
Palm Bay Elementary	186	691	877	21.20
Patrick AFB Elementary	41	519	560	7.32
Sabal Elementary	6	855	861	.69
Satellite High	12	1,641	1,653	.72
Sea Park Elementary	17	638	655	2.59
Sherwood Elementary	4	750	754	.53
Southwest Jr. High	179	662	841	21.28
Stone School	318	688	1,006	31.61
Summit (Spec. Ed.)	3	19	22	13.63
Surfside Elementary	1	718	719	.13
University Park Elementary	142	492	634	22.39
Totals	1,970	22,708	24,678	7.98

* Includes grades kindergarten through 12 plus exceptional education.

Exhibit A (4)

TOTAL BREVARD COUNTY MEMBERSHIP AT CLOSE OF 1970-71 SCHOOL YEAR, JUNE 9, 1971

School	Negro	Other	Total	Percent
Allen Elementary	0	662	662	.00
Andersen Elementary	51	762	813	6.27
Apollo Elementary	80	757	837	9.55
Audubon Elementary	2	928	930	.21
Cambridge Elementary	63	708	771	8.17
Capeview Elementary	5	807	812	.61
Carroll Elementary	74	692	766	9.66
Central Jr. High	88	1,268	1,356	6.48
Clearlake Jr. High	193	855	1,048	18.41
Cocoa Beach High	2	888	890	.22
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Eau Gallie High	38	1,593	1,631	2.32
Edgewood Jr. High	85	1,132	1,217	6.98
Fairglen Elementary	85	752	837	10.15
Freedom 7 Elementary	0	816	816	.00
Gardendale Elementary	161	578	739	21.78
Gemini Elementary	52	568	620	8.38
Golfview Elementary	79	553	632	12.50
Harbor City Elementary	62	739	801	7.74
Henegar Elementary	89	349	438	20.31
Holland Elementary	27	897	924	2.92
Hoover Jr. High	5	1,111	1,116	.44
Imperial Estates Elem.	68	524	592	11.48
Indialantic Elementary	74	739	813	9.10
Jackson Jr. High	135	1,091	1,226	11.01
Jefferson Jr. High	33	1,001	1,034	3.19
Johnson Jr. High	45	1,136	1,181	3.81
Kennedy Jr. High	254	517	771	32.94
Madison Jr. High	117	842	959	12.20

EXHIBIT A(4)—Continued

School	Negro	Other	Total	Percent
Meadowlane Elementary	168	652	820	20.48
Melbourne High	259	1,745	2,004	12.92
Merritt Island High	51	1,650	1,701	2.99
Mila Elementary	12	705	717	1.67
Mims Elementary	89	368	457	19.47
Oak Park Elementary	89	828	917	9.70
Ocean Breeze Elementary	4	882	886	.45
Old Dixie Elementary	119	489	608	19.57
Palm Bay Elementary	186	691	877	21.20
Parkway Jr. High	79	782	861	9.17
Patrick AFB Elementary	41	519	560	7.32
Pineda Elementary	216	815	1,031	20.95
Pinegrove School	35	68	103	33.98
Pinewood Elementary	27	261	288	9.37
Poinsett Elementary	737	23	760	96.97
Riverview Elementary	134	502	636	21.06
Rockledge Elementary	93	392	485	19.17
Rockledge High	353	978	1,331	26.52
Roosevelt Jr. High	2	906	908	.22
Sabal Elementary	6	855	861	.69
Satellite High	12	1,641	1,653	.72
Saturn Elementary	173	571	744	23.25
Sea Park Elementary	17	638	655	2.59
Sherwood Elementary	4	750	754	.53
Southlake Elementary	110	702	812	13.54
Southwest Jr. High	179	662	841	21.28
Stevenson Elementary	92	526	618	14.88
Stone School	318	688	1,006	31.61
Summit School	3	19	22	13.63
Surfside Elementary	1	718	719	.13
Titusville High	163	2,168	2,331	6.99
Tropical Elementary	0	974	974	.00
University Park Elem.	142	492	634	22.39
Whispering Hills Elem.	89	555	644	13.81
Total	6,413	53,579	59,992	10.68

* Includes grades kindergarten through 12 plus exceptional education.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-818

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA,

Petitioner,

—v.—

SYLVESTER WEAVER, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Question Presented

Whether the court of appeals erred in refusing to permit a school board to rely solely upon a majority-to-minority transfer plan to desegregate a virtually all-black elementary school where more effective techniques for desegregating that school were available to the board.

Argument

On October 13, 1961, black parents and students (hereinafter, "respondents") filed this lawsuit seeking an end to the dual, racially-segregated school system in Brevard County, Florida administered by the petitioner, the School

Board of Brevard County.[1] At that time, Poinsett Elementary was one of seven facilities in Brevard County attended exclusively by black students. Poinsett remained all-black until the 1969-70 academic year when petitioner was required by court order to implement a geographic zoning plan to desegregate that facility. As a consequence, 23 white students joined 737 black students at Poinsett, reducing its enrollment from 100% to 96.9% black. In 1971, petitioner was required to take further steps to desegregate Poinsett. A majority-to-minority transfer plan was approved by the district court for 1971-72 implementation. Yet, as of March, 1972, Poinsett remained 97% black, only 100 of the approximately 800 blacks enrolled there having exercised the right to transfer with space available and free transportation. The court of appeals agreed with respondents that the majority-to-minority transfer plan did not represent an effective technique for desegregating Poinsett.

Petitioner contends here that it has no affirmative constitutional duty to desegregate Poinsett further. This is so, petitioner argues, first, because it is not required to achieve racial balance in order to convert its dual system to a unitary one. Second, the existence of one virtually all-black school in its otherwise desegregated system does not, *per se*, render that system unconstitutional. And third, the majority-to-minority transfer approach constitutes an acceptable technique for achieving greater desegregation. Respondents do not quarrel with any of these assertions, considered in the abstract. But there are constitutional principles of equal importance relating to desegregation which must be considered in conjunction with those relied upon by petitioner. Racial balance is not the constitutional

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[1] Formerly called "the Board of Public Instruction of Brevard County."

objective; but school boards are under an affirmative duty to achieve the "greatest possible degree of actual desegregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The continued existence of all-black or virtually all-black schools can be condoned only where it has been established that no feasible alternatives are available to destroy the one-race character of such schools. *Swann, supra.* School boards may not rely upon majority-minority transfer plans to desegregate one-race schools where other more effective techniques exist. And school boards have a heavy burden to bear in justifying reliance upon manifestly less effective alternatives in dismantling dual systems. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

The court of appeals correctly applied this second set of principles in rejecting petitioner's majority-to-minority transfer plan for desegregating Poinsett. For it found that Poinsett was surrounded by at least six virtually all-white elementary schools which could be paired or clustered with Poinsett to desegregate that facility. The distances between Poinsett and these schools are as follows:

Golfview	—	1.2 miles
Cambridge	—	2.2 "
Mila	—	3.0 "
Anderson	—	3.5 "
Tropical	—	4.2 "
Audubon	—	5.6 "

The feasibility of pairing or clustering Poinsett with these schools was established by several facts. Petitioner had previously submitted a desegregation plan for Poinsett that would have converted it to a special education center to which children from not only the nearby six schools mentioned above, but from all the schools in the county,

would have been sent on a weekly rotation basis. And, the majority-to-minority transfer plan implemented by petitioner for the 1971-72 academic year envisioned that Poinsett students would be eligible to attend any of the six schools nearest that facility.

Hence that court concluded that petitioner had not achieved the greatest possible degree of actual desegregation, that Poinsett remained all-black despite the availability of more effective desegregation techniques, and that nothing in the record served to justify petitioner's preference for a patently less effective desegregation approach. Petitioner has presented nothing to this Court that discredits in any respect these findings of the court below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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